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THE LOGIC AND RHETORIC OF CONSTITUTIONAL LAW[1]

MY title is a theft from Charles A. Beard's brilliant essay in the *New Republic* on "Political Science in the Crucible." And what I shall say about it is doubtless the fruit of similar larceny from other thinkers. For most of us who labor in the vineyard of learning originate but little. And the few who originate seldom read papers before The American Political Science Association. So I shall not profess to be bringing before you thoughts that have sprung full armed from my own mind. In so far as I can trace their background I acknowledge indebtedness to Roscoe Pound and to John Dewey. And yet I must acquit them of any responsibility for my particular contentions; for the application is my own, and not only may power be lost in its transmission, but, even worse, it may be misdirected.

In the opening sentence of the essay referred to, Beard says that "political science in the United States has always been under bondage to the lawyers." This he finds due mainly "to the nature of our system of government, which places constitutionality above all other earthly considerations in the discussion of public measures." "The elucidation of our national issues," he continues, "has called for the lawyer's technology and rhetoric, although they have been at bottom matters of politics and public policy." And he concludes his opening paragraph with the sentence: "The hand is subdued to the dye in which it works, so the mind of men who have speculated on political science in America is subdued to the logic and rhetoric of constitutional law."

I

This prompts me to ask: What is the logic and rhetoric of constitutional law? I shall not trouble much about the rhetoric. Like the world, it is too much with us. Vague phrases which admit

[1] A paper read before the American Political Science Association at its meeting in Philadelphia, December, 1917. In preparing the paper for publication some slight changes have been made.

of various interpretations, which kindle the emotions, are the greenbacks of our common speech. If we doubt the value behind them, we ask for the gold of the specific and the concrete. Or else all too often we wager against them currency of similar tenor, but backed by other values which we more approve. Beard and the *New York Times* both give us rhetoric. My preference for the rhetoric of Beard is due, not to a literary judgment, but to a confidence in the values that lie behind the felicitous phrase of Beard and to a suspicion that the values behind the editorial oratory of the *Times* have sadly depreciated since the days of Herbert Spencer.

When Beard writes of "the ambulance of capitalism gathering up the wrecks of industrial anarchy," of Sociology wandering "around in the dim vastness of classified emotions," of Political Science "hanging in the vacuum of closed legal speculation," he writes rhetoric, and good rhetoric. But the rhetoric will take the place of specie only for those who trust what lies behind. And what is true of the rhetoric of Beard is true of the rhetoric of constitutional law. If we can personify such an agglomeration as our American constitutional law, and then attribute to it the vice of rhetoric, we must still be lenient: for it is a vice to which we all are prone. Even international affairs succumb to the spell of rhetorical treatment. Man is a rhetorical animal. But his rhetoric he uses to market his notions, not to make them. So it is the factory and not the salesroom that I invite you to explore. It is to the logic behind the rhetoric of constitutional law that I wish to direct your attention.

II

I may give a clue to my thesis by reporting an incident in a debate in the United States Senate. Senator Spooner of Wisconsin had been citing Supreme Court decisions to his purpose. When Senator Tillman of South Carolina was recognized, he complained: "I am tired of hearing what the Supreme Court says. What I want to get at is the common sense of the matter." To which Senator Spooner rejoined: "I too am seeking the common sense of the matter. But, as for me, I prefer the common sense of the Supreme Court of the United States to that of the Senator from South Carolina."

This in a nutshell is my thesis: the logic of constitutional law is the common sense of the Supreme Court of the United States. That common sense may agree with ours, or it may not. In some instances we might prefer Senator Tillman's. This much of comfort we have, at any rate, that, whenever we come upon a decision which is particularly displeasing, we usually find that there is a minority of

the court who feel as badly about it as we do. The variety of common sense which is offered by the divergent opinions of different judges is such that no intellectual palate need go without something to its taste.

This division of opinion among the judges of the Supreme Court finds its counterpart in the differences among those who debate in other forums. If the eight judges who sat in Stettler *v.* Oregon were evenly paired on the minimum wage, so were Alvin Johnson and Professor Taussig. Mr. Justice Pitney's views of the Adamson Law were anticipated by three of my friends—a retired dentist, a Professor of English and an instructor in chemistry. They were shocked when I told them that long ago the Supreme Court in Munn *v.* Illinois had decided that the legislature could limit the profits of those who conduct what we call a public utility. It comforted them a little to learn that, if the Adamson Law raised the expenses of the railroads so that their rates did not yield them what the court thought a fair return on their investment, the rates could be raised until the net earnings were reasonably remunerative. Yet to these lay friends of mine the idea that the owner of any kind of a business could not charge what he pleased and pay only such wages as he pleased was novel and abhorrent. And so it is with the other questions that separate the judges of our high tribunal into the familiar camps that shelter five in one and four in the other. Take a sampling from the men you talk with at the club and in the Pullman and you will find that their untrained common sense leads them to the same diverse conclusions to which the more highly developed instrument leads the judges.

We often hear that the lawyers have governed America. But it is equally true that America has governed the lawyers. The ideas that lawyers have expressed in the legislature, at the bar and on the bench have not sprung from any mysterious source whose hiding place is revealed only to those who read books in sheep bindings. The doctrine of individualism was not invented by judges. Your Southern school boy is as familiar with the dangers of allowing the federal government to encroach on the reserved powers of the states, as are the judges who annulled the federal Child Labor Law. The "mysteries of constitutional law," which Beard tells us are invoked when other comforts fail, do not seem to me mysteries at all. The rhetoric is not unlike the rhetoric we all use. And the logic behind the rhetoric is the logic with which you and I debate our disagreements.

Immortal principles fly their standards in judicial opinions, yes. But so they do in the common every-day talk of the butcher and banker, of the suffragist and the anti-suffragist, the pacifist and the

militarist, the Socialist and the individualist. Arguments from expediency to reinforce the immortal principles will be found in judicial opinions as they are heard on the hustings. And there are judges who find no immortal principles, who conceive their task to be that of making wise adjustments amid competing considerations. "Constitutional law," says Mr. Justice Holmes, "like other mortal contrivances, has to take some chances." "Difference of degree," observes the same jurist, "is one of the distinctions by which the right of the legislature to exercise the police power is determined." And no one has put better than he the point of view that rejects universals and the absolute. "All rights," he tells us, "tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

Many men of many minds have sat on our Supreme Bench as they have read papers at meetings of the American Political Science Association or lectured in college class-rooms. Judges argue from undisclosed assumptions, as you and I argue from undisclosed assumptions. Judges seek their premises from facts, as you and I strive to do. Judges have preferences for social policies, as you and I. They form their judgments after the varying fashions in which you and I form ours. They have hands, organs, dimensions, senses, affections, passions. They are warmed and cooled by the same winter and summer and by the same ideas as a layman is. If there is a mystery to constitutional law, it is the mystery of the commonplace and the obvious, the mystery of the other mortal contrivances that have to take some chances, that have to be worked by mortal men. The logic behind the rhetoric is the logic of finding out what words mean, what purpose the words were meant to serve. And where the words of the Constitution offer no guide, the logic is that of finding out what is most expedient.

III

It will be apparent how much of our constitutional law is merely getting at the common sense of the matter when we consider how few of the questions of constitutional law are answered by any specific language in the Constitution. When the language is really specific, questions seldom arise. The majority of current decisions have to deal with the clause forbidding the states to deprive any one of life, liberty or property without due process of law, and with the clause granting to Congress the power to regulate commerce among

the several states. And most of the questions under the latter clause concern, not the power of Congress but the power of the states, about which the Constitution is silent. "Due process of law," though it occurs twice in the Constitution, is left without definition. Important questions respecting the taxing powers of the states and of the United States arise, not under any language of the Constitution, but because the Constitution ordains a federal system of government, and thereby makes possible a clash between state and national interests.

In interpreting the Constitution the courts have the task of applying the general to the particular. Our constitutional clauses are couched in such extremely general language that there is something fictitious in calling the work of the courts a work of interpretation. It is but to a slight extent a literary task. It is to a very large extent the task of weighing competing practical considerations and forming a practical judgment. That this is true in decisions involving the police power is made clear by the judicial recognition of the fact that the question in issue is whether the unwelcome deprivation of liberty or property is reasonable or arbitrary. The judgment of the courts is none the less a practical one because it may be influenced by a general preference for leaving folks unfettered by law, or by an opposing preference for imposing social standards. Those preferences are not unrelated to what is thought to be most desirable in practise.

In determining the scope of state power which touches interstate commerce, the opinions of the Supreme Court make very clear that the problem to be solved in each case is whether the promotion of the local needs of the state justifies the interference with interstate commerce which such promotion entails. Unripe fruits may be forbidden to leave the state, though oil and gas may not. An unimportant inlet of the sea may be dammed, but bridges over important rivers must be high enough for ships to pass under. Interstate trains may be required to slow down and blow whistles, but may not be compelled to make a detour to accommodate the inhabitants of a given city. The formula under which such cases are decided is as flexible as is the distinction between what is reasonable and what is arbitrary. And the practical considerations almost invariably receive chief attention in the judicial opinions.

Under the due-process clause the Supreme Court has held that a state may restrict the working day to ten hours in mines, but not in bake-shops. Under the commerce clause the states are permitted to tax goods from other states still in the original package, but are forbidden to prohibit their sale. In the absence of any applicable clause in the Constitution, the states are forbidden to tax such part

of the capital stock of a corporation as is invested in United States bonds, but are permitted to tax the franchise of the corporation and base the amount on the capital, even though it is invested in United States bonds. Under the clause forbidding the states to impair the obligation of contracts, a creditor of a city may resist a legislative reduction of the city's tax rate, but has no relief against the legislative restriction of the kinds of property subject to municipal taxation.

These contrasted decisions can not be explained by reference to the language of the Constitution. "Due process" is as silent about bakeries as it is about mines. "Obligation of contracts" is as silent about tax rate as it is about exemptions. The controlling considerations in the solution of these problems have been considerations of common sense—none the less common sense because it may not have been your common sense or my common sense, or because the common sense of the majority of the Supreme Court has at times disagreed with that of their dissenting colleagues.

IV

When we turn to the reasons which are given for the constitutional decisions we find them the same kind of reasons that you and I would give for our judgments. In Lochner *v.* New York which declared unconstitutional a ten-hour law for bakers, Mr. Justice Peckham says that the question is whether the law is a "fair, reasonable, and appropriate exercise of the police power" or an "unreasonable, unnecessary, and arbitrary interference with the right of the individual." He finds it unreasonable because he thinks "there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere." Mr. Justice Harlan for the minority says that the question is debatable, and that therefore the court should accept the judgment of the legislature. There is nothing peculiar to constitutional law in this kind of logic. Indeed, if the logic of constitutional law is to be criticized, there is better reason for complaining that it is the kind of logic we all use than for objecting that it is something mysterious.

What is abstruse or mysterious in the opinions of the judges with respect to the constitutionality of the income tax of 1894? The question to be decided was whether such tax was direct or indirect. The majority in the case of Pollock *v.* Farmers Loan & Trust Co. says that a tax on income from land is the same in effect as a tax on the land itself. Since a tax on the land itself is conceded to be a direct tax, the same must be true of a tax on income therefrom. The

minority, on the other hand, appeals to precedent to show that only capitation taxes and taxes on land have been regarded as direct taxes. When land is taxed directly, it must contribute to the government, whether it contributes to its owner or not. But to tax the rentals is not to tax the land itself. If the land yields no income, it pays no tax. Therefore a tax on rentals is only indirectly on land, and is thus an indirect tax. These are the main opposing arguments. The question is certainly debatable. And the judges debated it in the same fashion that participants in an intercollegiate contest would debate it. Varying interpretations were put upon quotations from previous authorities. Differing weight was given to various considerations of expediency.

Mr. Justice White was so convinced that the majority was wrong that he filed a long dissenting opinion, notwithstanding his expressed belief that "the only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in conclusions of courts of last resort." But there is no reason why lack of unanimity should engender want of confidence in the courts. Of course it engenders want of confidence in any notion that constitutional law is some divine voice of which the court is merely the mouthpiece. But the fact that judges disagree, and freely express the reasons for their disagreement, should add to our confidence in their labors rather than detract from it. It indicates that the judgment was reached only after careful consideration and full discussion. We have nine judges instead of one, twelve jurors instead of one, because we know that human judgment is fallible and because we wish by increase of numbers to decrease the margin of error. Though when our passions are strong we sometimes forget that out of a multitude of counsel cometh wisdom, our enterprise of democracy is an expression of our abiding faith that the erring thoughts of individuals are best controlled by the full play of competing opinions. We may therefore lack confidence in the particular conclusions of particular judges, and yet have high regard for the institution that operates, as all human institutions must operate, through the judgments of designated individuals.

V

Some there are who seem to hold that government does not operate through the judgments of individuals. The famous distributing clause of the Massachusetts constitution of 1780 embodies this attitude. The legislative department is forbidden to exercise the executive and judicial powers or either of them; the executive, to exercise

the legislative and judicial powers or either of them; and the judicial department, to exercise the legislative or executive powers or either of them: "to the end it may be a government of laws and not of men." This happy phrase is often on the lips of those who profess to think of government as some mechanical contrivance that, once wound up, will run itself. They would undoubtedly be grieved to hear that a philosophic wag had once revised it to read: "to the end it may be a government of lawyers and not of men." They would not care to be reminded that as long ago as March 31, 1717, Bishop Hoadley said: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them."

Of course the authority of the Supreme Court to interpret the Constitution is by no means an absolute authority. It is limited in part by the language of the Constitution, in part by prevailing sentiments and by existing conditions. Now that the Supreme Court has been at work for over a century, the authority of the present wielders of judicial power is limited to a large extent by the interpretations of their predecessors. The legislative powers of impeachment and of increasing the number of judges, the executive power to select new incumbents of the judicial office, the possibility that an Andrew Jackson in the White House may refuse to execute the order of the court, or that a commander of armed forces may decline to obey a writ of habeas corpus, as Chief Justice Taney discovered when he ordered Merryman to be brought before him—these are all potential restrictions on the actual authority of the Supreme Court. Yet, in determining a great number of the most important questions, there are two or more courses equally open to the Supreme Court, as the constantly recurring division of judicial opinion amply demonstrates. If by some necromancy the majority and the minority opinions in all the great decisions could be transposed, our constitutional law would be hardly recognizable.

Even the holders of the mechanical theory recognize that in the past the personal viewpoints of the judges have been influential, if not controlling, factors in the course of judicial decision. Chief Justice Marshall is often and rightly lauded for so "shaping the Constitution" that the power of the national government was unhampered by the residuary powers of the states. The fear of the judges themselves that they shall be discovered to be something more than mere automatons is not so acute as once it was. An able judge of one of our state courts tells me that he is usually able to decide cases as his independent judgment dictates. And he cites me a habit of

Coke's to show that this is no new departure. When Coke, he says, had difficulty in adducing precedents for the decisions he wished to reach, he would pen: "As the old Latin maxim saith:" and then he would invent the maxim. In the *Yale Law Journal* for November, 1917, a judge of the New Hampshire supreme court refers to the time "when the court seems to have thought that it was inspired, or that the rules it formulated were revealed to it," and observes that "the study of the history of the court will show how these rules were in fact formulated, and will, I think, demonstrate that they were made by the court in the same way statutes are made by the legislature." In a later issue of the same journal Mr. Justice Riddell of the Supreme Court of Ontario quotes Lord Bramwell to the effect that "one-third of a judge is a common juror if you get beneath the ermine," and adds that: "The other two-thirds may not be far different." And Mr. Justice Holmes, whose judicial opinions teem with wisdom in fine raiment, told us a year ago in the Jensen case that "the common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified." And he says also that he recognizes "that judges do and must legislate," adding, however, that "they can do so only interstitially; they are confined from molar to molecular motions."

Human beings performing a human task—that is the picture thrown on the screen for me by the words "constitutional law." Human beings wondering what to say and how to say it, as I am wondering now, regretting that they lack the time to say it better, to think it through more fully before they write it down. If you hear judges talk about their own decisions and opinions, and criticize or praise the work of their brethren, the mysteries of constitutional law will be revealed. And how could it be made plainer than in every dissenting opinion? If criticism of the courts is a sacrilege, the worst offenders are the courts themselves. Perhaps it is security of tenure that makes them bold. If this is true, it argues well for the grant of security of tenure to all who have the vision and the courage to do something more than echo the platitudes that find acceptance in high places. For dissenting judicial opinions are most valuable equilibrators in the undulating course of the law. They have the modifying influence of the opposition bench in the House of Commons. It is refreshing that the judges themselves have no notion that a sanctity envelops what they write. And the sanctity that lawyers and laymen would sometimes accord to judicial opinions is more lavishly bestowed on those which meet their liking than on those with which they disagree.

VI

In thus emphasizing the common-sense element in the development of the law that is made by judges, I may seem to many to be grossly overstating my case. Others have insisted that judges are slavish adherents to precedent, that they revel in absurd fictions and technicalities, and that they cherish abstractions to the disregard of realities. I will not contend that these plaints are entirely without foundation. But it is a myopic vision which finds these mental traits characteristic of judges or which regards them as the major forces in judicial decision. And the traits are found in many who know Blackstone only as a name. Some of you have doubtless been on committees which disposed of the matter in hand by appeal to precedent or to an abstraction. You may have helped to reject a petition by insisting that it was not properly before you for consideration. But any who have been guilty of such seeming artificiality are well aware that reasons of practical policy actually determined their action. Such is usually true of the seeming artificiality of the law. And the fictions of the law are notoriously the fruit of the desire to achieve some practical end. But even if artificiality is often potent in the mechanics of handling particular cases, it is not characteristic of the gradual shaping and reshaping of the substantive rules of law. If we take a long-time view of the growth and modification of judicial doctrines, we can not escape the realization that beneath the surface the moving forces are the practical judgments of the human beings who wield judicial power.

Lawyer-like and human-like I appeal to authority to support my contention. Over thirty-five years ago Holmes, in his lectures on *The Common Law,* told us:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

And later in the book he reiterates his position:

> On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally to be sure, under our practise and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

It may seem strange to laymen that these forces are even more potent in the judicial interpretation of a constitution reduced to writing than in the evolution of what we call the unwritten law. But this is nevertheless the fact, at least with respect to the interpretation of those clauses of the Constitution which present the chief field for controversy. And those who are competent to speak tell us that the written codes of other peoples are similarly adapted by the judges to the practical situations which call for practical adjustment. Professor Munroe Smith has outlined the process for us in his lecture on *Jurisprudence:*

> For more than two thousand years it has been an accepted legal principle that, in interpreting the written law, effect should be given, as far as possible, to the spirit and intent of the law. Here again the possibilities of lawfinding under cover of interpretation are very great. A distinguished German jurist, Windscheid, has remarked that in interpreting legislation modern courts may and habitually do "think over again the thought which the legislator was trying to express," but that the Roman jurist went further and "thought out the thought which the legislator was trying to think." Of this freer mode of interpretation Windscheid might have found modern examples. The president of the highest French court, M. Ballot-Beaupré, explained, a few years ago, that the provisions of the Napoleonic legislation had been adapted to modern conditions by a judicial interpretation in "*le sens évolutif.*" "We do not inquire," he said, "what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be." In English-speaking countries this freer mode of interpretation has always been applied to the unwritten or common law, and it is usually applied to the written law with a degree of boldness which is very closely proportioned to the difficulty of securing formal amendment. Thus the rigidity of our federal constitution has constrained the Supreme Court of the United States to push the interpreting power to its furthest limits. This tribunal not only thinks out the thoughts which the Fathers were trying to think one hundred and twenty years ago, but it undertakes to determine what they would have thought if they could have foreseen the changed conditions and the novel problems of the present day. It has construed and reconstrued the constitution in "the evolutive sense," until in some respects that instrument has been reconstructed.

VII

Of course in likening the logic and the rhetoric of constitutional law to the logic and the rhetoric of you and me, I am not unaware of differences between an institution and an individual. Constitutional law differs from you and me in that it has a longer history. Its judgments are those of many individuals and not of one alone. It seeks a consistency and a continuity that you and I are free to go without. But even constitutional law changes its mind. In 1895 by vote of five to four the Supreme Court held in Lochner *v.* New York that a state could not limit to ten the daily hours of labor in bakeshops. But the case is no longer law. Very brief is the funeral

oration read by the Supreme Court in 1917 over the death of this same and little-lamented Lochner *v.* New York, which is not even mentioned at its own obsequies. Bunting *v.* Oregon, in which the last rites were solemnized, sustained a ten-hour law applying, not to bake-shops alone, but to "mills, factories and manufacturing establishments." In dismissing the contention that the Oregon statute was not necessary or useful for the preservation of the health of employees, Mr. Justice McKenna said briefly: "The record contains no facts to support the contention, and against it is the judgment of the legislature and the supreme court" of the state.

Constitutional law changed its mind about the power of Congress to make government notes legal tender, about its power to levy taxes on incomes from real estate and personal property without apportionment among the states according to population, and about its power to apply to manufacturing corporations its prohibitions against restraint of trade. And in numerous instances where decisions are not directly overruled, they are whittled away by exceptions to avoid results deemed undesirable. Administrative commissions have been allowed to take over function after function previously exercised by the judiciary or by the legislature, though constitutional law still maintains that such commissions can exercise neither legislative nor judicial power. Notwithstanding the biblical warning, much new wine is poured into old bottles. Often the substance changeth though the form doth not. Constitutional law, as well as theology, can reinterpret old doctrines to meet new needs. Genesis can survive Darwin in rigid sheep as well as in limp morocco.

Without knowing anything about the laws of the Medes and the Persians, except by rumor, I am inclined to doubt whether the rumor that they were unchanging is correct. But the rumor establishes at any rate that such fixity as was theirs was eccentric even in those days. If native to them, it is foreign to the law of the Constitution of the United States as laid down by the Supreme Court. In spite of the stabilizing or stratifying effect of the doctrine of *stare decisis*, constitutional law has less of the *idée fixe* than many of us. But this is not to deny that in spots it is as stubborn as any of us. But, flexible or stubborn, wise or unwise, doctrinaire or practical, constitutional law is not mysterious, but only human—human as you and I are human, as all government is human.

VIII

This analysis of what seem to me the controlling characteristics of constitutional law is not meant to be applied to constitutional lawyers. For those who have won fame at the bar have been for the

most part men whose lives are largely spent in safeguarding private interests against competing public interests. Their private employment is continuous, while the advocates of the public interest serve their brief term and then give way to their successors. Thus there tends to be a persistent bias among lawyers which makes it difficult for them to hold the scales as evenly as do the judges. No one is apt to question the qualifications of Mr. Elihu Root to testify on this point. In his address in 1916 as president of the American Bar Association he says that it is "quite natural that lawyers employed to assert the rights of individul clients and loyally devoted to their clients' interest should acquire a habit of mind in which they think chiefly of the individual view of judicial procedure, and seldom of the public view of the same procedure." And he adds:

> There are indeed two groups of men who consider the interests of the community. They are the teachers in the principal law schools and the judges on the bench. With loyalty and sincere devotion they defend the public right to effective service; but against them is continually pressing the tendency of the bar and the legislatures and, in a great degree, of the public towards the exclusively individual view.

It is interesting to note that those whom the bar calls great constitutional lawyers are the ones who have been in great cases, irrespective of their success in those cases. Those who may wonder why the obscure attorney general of some sparsely populated state, or some subordinate member of the Department of Justice, so often wins his case against the leaders of the bar may find a clue to the answer in the observation of an able metropolitan attorney. When asked if he thought it fair that his railroad should be represented by a hundred-and-fifty-thousand-dollar man while the people of the United States had only the services of a five-thousand-dollar man, he replied: "Oh it's not so uneven as that. You see, the Lord is on their side." The remark was not intended to be cynical. It was profound. And it was true, because constitutional law, the distilled and clarified common sense of the judges of our high tribunal, does not "hang in the vacuum of closed speculation," but advances with the march of changing conditions. That is why it is so baffling to many lawyers, as the reason why it is so baffling to many reformers is that it follows conditions rather than leads them.

IX

It may shock some reverential person to hear that law, and especially constitutional law, is not an impersonal and majestic power which moves in some mysterious way its wonders to perform. Those imbued with proper legal piety may think it unbecoming in a

great jurist to tell us in a judicial opinion that constitutional law is a human contrivance that has to take chances. As children we used occasionally to think our teachers something other than human—either better or worse. And the same childlike simplicity characterizes the attitude of some who talk about constitutional law. From varied sources constitutional law has received its meed of reverence and of execration. Some deem it holy; others think it sinister. And after all it is merely human. Being human it undoubtedly makes mistakes. Being human it also contributes to the general weal. All will agree that some constitutional law is better than others. But men will forever disagree as to what is good and what is bad. So also will they disagree about what is good and bad in other human contrivances.

If on the whole we do not like the work of our courts, we may assign their tasks to other authorities. But those other authorities would not be always unanimous. Their majorities would not always please the majority of us. Their logic and their rhetoric would differ little from the logic and rhetoric of the courts. They would inevitably have regard for precedent and for the existing scheme of things. For all of us regard these considerations when we make our individual choices. If we do not wish the courts to be trammelled by precedents, we can declare in our constitutions that they shall decide each case according to their independent judgment. But even then their judgments will be influenced by those of their predecessors. The citation of authorities is not confined to courts. We all do it, and why? Because we have respect for the judgments of others.

There is always danger in personification. What is said about Rome or Greece or Germany or England or constitutional law is usually only measurably true. In picking what seems characteristic for the purpose in hand, we neglect the many exceptions and variations. So on general principles I should be somewhat inclined to plead *nolo contendere* to the charge of overstating my case. Yet my thesis seems to me to take care of all possible exceptions and variations. For it is confined to the contention that the logic and rhetoric of constitutional law, however multifarious its manifestations, is not *sui generis*. Much of it may be peculiar, but it is not peculiar to constitutional law.

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